United Nations A/CN.9/488

General Assembly

Distr.: General
5 July 2001

Original: English

United Nations Commission on International Trade Law
Thirty-fourth session
Vienna, 25 June-13 July 2001
Item 12 of the provisional agenda*
Possible future work on privately financed infrastructure projects

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Note by the Secretariat

1. At its thirty-third session (New York, 12 June- 7 July 2000), the Commission adopted the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects, consisting of the legislative recommendations (A/CN.9/471/Add.9), with the amendments adopted by the Commission at that session and the notes to the legislative recommendations (A/CN.9/471/Add.1-8), which the Secretariat was authorized to finalize in the light of the deliberations of the Commission (A/55/17, para.372).[1] The Guide has since been published in all official languages.

2. At the same session the Commission also considered a proposal for future work in that area. It was suggested that, although the Legislative Guide would be a useful reference for domestic legislators in establishing a legal framework favourable to private investment in public infrastructure, it would be nevertheless desirable for the Commission to formulate more concrete guidance in the form of model legislative provisions or even in the form of a model law dealing with specific issues.[2]

3. After consideration of that proposal, the Commission decided that the question of the desirability and feasibility of preparing a model law or model legislative provisions on selected issues covered by the Legislative Guide should be considered by the Commission at its thirty-forth session. In order to assist the Commission in making an informed decision on the matter, the Secretariat was requested to organize a colloquium, in cooperation with other interested international

* A/CN.9/482

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organizations or international financial institutions, to disseminate knowledge about the Legislative Guide. [3]

4. A Colloquium under the title "Privately Financed Infrastructure: Legal Framework and Technical Assistance" was organized with the co-sponsorship and organizational assistance of the Public-Private Infrastructure Advisory Facility (PPIAF), a multi-donor technical assistance facility aimed at helping developing countries improve the quality of their infrastructure through private sector involvement. It was held from 2 to 4 July 2001 in Vienna, during the second week of the thirty-fourth session of the Commission. The Colloquium was aimed at presenting best legislative and regulatory practices, as well as at assessing the needs of recipient countries for assistance in establishing a legislative and regulatory framework for public-private partnerships. Since the Colloquium was also designed to assist the Commission in deciding the issue of possible future work in the field of privately financed infrastructure projects, participants were invited to make recommendations on the desirability and, especially, the feasibility of a model law or model legislative provisions in that area.

5. There were more than 70 registered participants at the Colloquium, including Government officials, bankers and private sector lawyers from more than 20 States, and representatives of organizations of the United Nations system (United Nations Economic Commission for Europe and United Nations Industrial Development Organization), of multilateral financial institutions (such as the African Development Bank, the European Bank for Reconstruction and Development, the International Finance Corporation and the World Bank), of intergovernmental organizations (such as the European Commission and the International Development Law Institute) and non-governmental organizations (such as the European Lawyers Union, the *Fédération Internationale des Ingénieurs-Conseils* (FIDIC), the *Forum Européen des Entreprises Générales*, the Panamerican Surety Association (PASA) and the International Surety Association). The participants represented a broad range of practical experience and the perspectives of different legal systems.

6. The more than 20 speakers included representatives from international organizations, leading academics in the field of law, government officials and private practitioners having a significant experience in privately financed infrastructure projects. In addition, open floor segments interspersed in the programme added to the range of experiences and views presented.

7. The present note contains a description of the information presented, the views expressed, the issues raised and the recommendations made at the Colloquium for consideration by the Commission.

8. The first day of the Colloquium was devoted to exploring manners in which international organizations can best assist countries in implementing domestic policies for private infrastructure investment. The types of assistance that international organizations currently provided or envisaged to provide to countries wishing to use private finance to implement their infrastructure were presented in a detailed fashion.

9. The second day was devoted to the presentation of the legal framework and the specific experience in selected countries, including Argentina, Brazil, Croatia, France, Hungary, the Philippines, Uganda, the United Kingdom and the United States of America.

10. The third and final day was devoted to exploring the views of the private sector, both from financial institution and contractors and infrastructure operators, as well as to a final debate on how to disseminate knowledge about the Guide and the desirability and feasibility of preparing a model law on selected issues dealt with in the Guide.

11. The general view of participants was that an adequate legal background was essential to the availability of private investment for infrastructure projects. In this connection, it was noted that the Legislative Guide was not meant to suggest private financing as necessarily the best way to promote and implement public infrastructure but rather at assisting legislators in setting up an adequate legal framework once the decision in favour of privately financed infrastructure was made.

12. Experience cited by participants, especially by representatives of international organizations, suggested that the main factors constraining the availability and development of privately financed infrastructure were the following: poor policies and inadequate regulations, both at a legislative and at an administrative level, this leading to high contracting and bidding costs; poor bankability of projects; lack of effectiveness of contracts; institutional weakness and lack of coordination at the government and administrative level; lack of project management skills at government side; lack of competition and transparency of selection procedures; weakness of domestic markets and of participation of local business.

13. Reciprocally, a number of factors capable of fostering the interest of the private sector in public infrastructure were mentioned. Those factors included the following: strong political will and leadership; clear and permissive legal framework; sound coordinating bodies within the public administration; clarity as to the priorities and objectives to be achieved through involvement of the private sector.

14. Accordingly, the types of assistance that might be provided to host countries included, on the one hand, financial assistance for the following activities: co-financing of project development; advisory services with a view to developing the domestic legislative and administrative framework; identifying guidelines and standard procedures; assistance in training and capacity building; technical assistance for specific infrastructure projects; investment promotion; strengthening and expansion of guarantees. On the other hand, non-financial assistance that might be available to host countries included the following modalities: helping drafting new legislation or amending existing legislation; drafting model concession agreements; advisory services to improve efficiency of relevant government agencies and to increase transparency in public procurement; training in legal matters and in business skills and infrastructure sector reform. The importance of assistance devices aimed at enabling developing and transition countries to run projects on an autonomous sustainable basis was also stressed. The view was widely shared that a greater level of coordination among those organizations was desirable, with a view to avoiding duplications and overlapping of the different types of assistance they provided.

15. A general view of participants was that the Legislative Guide was a valuable product to assist domestic legislators in establishing a legislative framework favourable to privately financed infrastructure projects and that efforts should be made to ensure its wide dissemination. It was recognized that the Guide could serve well not only as an instrument for drafting new legislation but also as a checklist to

establish the adequacy and effectiveness of legislation already in force. Accordingly, the Colloquium strongly recommended that the Secretariat, in coordination with other organizations, undertake joint initiatives to ensure the widespread knowledge of the Guide (including its presentation in regional seminars, conferences and workshops, as well as within international conferences on project finance; its advertising in reviews and bulletins of international organizations, of industrial or professional associations and of private law firms; its inclusion in courses run by international organizations; the establishment of hyperlinks within the web-sites of relevant organizations).

16. The Colloquium heard a number of views as to the desirability and feasibility of a model law in the field of privately financed infrastructure.

17. On the one hand, several participants stated that there was significant demand for such a model law. It was noted that the Guide represented a good starting point but that more concrete guidance, in the form of model legislative provisions, was desirable, especially for those countries with no or only little experience in the field of privately financed infrastructure projects. In that connection, it was noted that a model law would most likely not only encourage those countries to address policy issues underlying privately investment in infrastructure, but also facilitate the legislative process leading to the enactment of legislation. A further view was that the availability of a model law would foster capacity building in developing countries and might help reduce their reliance on advice from experts from developed countries.

18. It was suggested that model provisions could usefully serve as guidance not only to the benefit of legislators, but also throughout the negotiation process, ultimately making it quicker and more effective. Additionally, it was observed that model provisions might also be useful within the governments, with a view to harmonizing policies and procedures within the various departments and agencies. Furthermore, it was noted that a model law or model legislative provisions might serve an educational purpose to the benefit of legislators, government officers and magistrates.

19. While those views gathered wide support within the audience, the views varied as to the issues that might be usefully dealt with in model legislative provisions. According to one view, the Commission might consider the idea of drafting a short model law, consisting of a limited number of core, indispensable provisions addressing issues and areas where experience had shown that a sound legal framework was crucial in order to attract private investment. It was observed that such a model law did not have to address the entire range of issues covered in the Legislative Guide. Most of the content of such a model law, it was said, could be derived from the Legislative Guide itself, where most of the controversial issues had been addressed in a manner that was acceptable to various legal systems. Furthermore, it was observed that the undertaking of such a project would not prevent from undertaking other additional initiatives aimed at ensuring the widest possible dissemination of the Guide. Another proposal was that such model legislative provisions should only address a specific phase of the privately financed infrastructure projects, namely the selection of the concessionaire.

20. The countervailing view, which also attracted strong support among the participants, was that the preparation of a model law was neither feasible nor desirable. As to feasibility, it was recalled that the significant disparity of approach in different legal systems had already led to the failure of less ambitious projects

undertaken at a regional level. As to desirability, a general concern was that the immediate undertaking of a project aimed at drafting model legislative provisions in the field of privately financed infrastructure might adversely affect the considerable and valuable work which led to the adoption of the Guide. It was suggested that the desirability of such a project should be considered at a later stage, once the existence and the contents of the Guide had been made better known to legislators and the utility of the Guide had been actually tested. As to the idea of drafting a short model law, doubts were expressed as to the feasibility of preparing a text that would be as acceptable to the various legal systems represented at the Commission as the Legislative Guide. A further view was that a model law would not be able to adequately reflect and address the peculiarities of the different agreements existing in the field. Concerns as to the costs and time that such an effort would require were also expressed. Finally, the need to avoid overlap and interference with other projects currently undertaken by the Commission was also recalled.

21. The participants in the Colloquium were reminded of situations where a model law would not necessarily have a positive impact on the development of infrastructure. It was noted that many of the crucial issues of private investment in infrastructure did not lend themselves to be properly addressed within the context of a model law, being of a political rather than of a legal nature. It was also pointed out that a number of countries were currently reviewing their legislation in the area of privately financed infrastructure projects and that some of them were already using the Legislative Guide as a basis for that exercise. The concern was expressed that a decision by the Commission to undertake further work in this area might lead to confusion in those countries as to the authoritative nature of the Legislative Guide as a source of guidance for domestic legislators. That risk might be even greater if the final text of the model legislative provisions were to conflict with, or deviate from, the recommendations contained in the Legislative Guide.

22. While there was no sufficient consensus for the Colloquium to formulate a concrete recommendation to the Commission on the desirability and feasibility of preparing model legislative provisions in the area of privately financed infrastructure projects, participants in the Colloquium expressed their hope that the above considerations might help the Commission make an informed decision on the matter.

23. Without prejudice to the decision of the Commission as to possible future work, the Colloquium strongly recommended that the relevant international intergovernmental and non-governmental organizations, as well as multilateral financial institutions, devise joint strategies to promote best practices in the area of privately financed infrastructure projects. The Colloquium also strongly recommended that those organizations give special attention to the need for ensuring consistency of approach in their activities and avoiding unnecessary duplication of efforts.

24. The Commission may wish to express its gratitude to the Public-Private Infrastructure Advisory Facility (PPIAF) for the financial and organizational support extended to the Secretariat in the preparation of the Colloquium. The Commission may also wish to express its appreciation to the various international intergovernmental and non-governmental organizations represented at the Colloquium and to the speakers invited by the Secretariat. The Commission may further wish to request that the proceedings of the Colloquium be published by the United Nations.

[1] *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17* (A/55/17), paras. 195-368.

[2] Ibid., para. 375.

[3] Ibid., para. 379.